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Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
vs.
JERRY LEE MASON,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI

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QUESTION PRESENTED

BECAUSE AS A MATTER OF THE HISTORY INFORMING THE MEANING OF THE DOUBLE JEOPARDY CLAUSE AT ITS ADOPTION, AN "ACQUITTAL" WAS UNDERSTOOD TO MEAN ONLY THE VERDICT OF A JURY, A JUDGMENT ENTERED BY THE TRIAL COURT TAKING THE CASE FROM THE JURY ON DEFENSE MOTION ON THE GROUND THAT NO RATIONAL JUROR COULD FIND GUILT BEYOND A REASONABLE DOUBT BEING UNKNOWN, SHOULD UNITED STATES V MARTIN-LINEN SUPPLY BE OVERRULED, SO THAT THE A STATE MAY ALLOW PROSECUTION APPEALS FROM ERRONEOUS GRANTS OF MOTIONS FOR DIRECTED VERDICT (JUDGMENTS OF ACQUITTAL), THEREBY PERMITTING THE STATE TO HAVE ONE FULL AND FAIR OPPORTUNITY FOR A VERDICT IN THE CASE?

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
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NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of Research, Training and appeals, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on September 17, 1991, leave to appeal denied by the Michigan Supreme Court November 25, 1991.

OPINIONS BELOW

The order of the Michigan Court of Appeals is unreported and is appended as Appendix A. The Order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on September 17, 1991. The order of the Michigan Supreme Court was entered on November 25, 1991. The jurisdiction of this Court is invoked under 28 USC { 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in

pertinent part: "No person shall be...subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The trial judge in this case granted a defense motion for directed verdict at the conclusion of the prosecution case. Given that the victim, an eyewitness, positively identified the defendant (and that there was also other evidence), taking the evidence in the light most favorable to the People it could not be said that no reasonable juror could find guilt beyond a reasonable doubt. Nonetheless the motion was granted. The People were thus precluded, on defense motion, from a jury verdict in the case. The People sought to appeal, permitted in Michigan in all circumstances where not precluded by jeopardy. The Michigan Court of Appeals rejected the appeal on the ground that jeopardy precluded it under current law, and the Michigan Supreme Court denied leave. The State seeks certiorari, and the overruling of United States v Martin-Linen Supply, which bars its appeal.

REASONS FOR GRANTING THE WRIT

Petitioner candidly seeks the overruling of United States v Martin-Linen Supply (and its ancestors --e.g. Fong Foo--and progeny --e.g. Smalis v Pennsylvania). In Smalis v Pennsylvania, 476 US 140 (1986) this Court found past precedent dispositive: "Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling (a grant of defense demurrer at the close of the prosecution's case) is an acquittal under the Double Jeopardy Clause." Petitioner submits that now is the time to reconsider, for neither history nor logic support the bald statement in Fong Foo, followed in Martin-Linen Supply, that a directed verdict of acquittal is the "same" for jeopardy purposes as a jury verdict, and this Court has never scrutinized the question. A determination that no rational

fact-finder could find guilt beyond a reasonable doubt, made by the judge, who has not the authority to enter a judgment of conviction absent a verdict from the jury, is a ruling of law, and should not, Petitioner submits, be considered the same as a verdict from the jury. If erroneous, defendant has sought it, and retrial ought to be permitted.

AN ABBREVIATED HISTORY OF JEOPARDY

The historical background informing the jeopardy clause does not support Martin-Linen Supply. Blackstone's formulation of "double jeopardy" came by way of a plea in bar, going not to the merits of the cause but "to the merits of the indictment," and giving "a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged." IV Commentaries, at 329. Drawing from the work of Coke, Blackstone

identified four such pleas, outlining them in some detail:

> "First, the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime....

* * *

"Secondly, the plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime....

* * *

Thirdly, the plea of autrefois attaint, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict of confession, by

outlawry, or heretofore by abjuration...he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. And this [is] because, generally, such proceeding on a second prosecution cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had...so that it is absurd and superfluous to endeavor to attaint him a second time....And from these instances we may collect that the plea of autrefois attaint is never good, but when a second trial would be quite superfluous.

* * *

> "Lastly, a pardon may be pleaded in bar...as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict...."
>
> IV Commentaries, at 329-331.

Though the American rejection of the concept of "corruption of blood" would render obsolete the plea of autrefois attaint, Blackstone's formulation stands as the authoritative expression of the Law's policy against multiple punishments at the time of the Bill of Rights. And though his language suggests several differences between the 18th Century practice and our own, it was this conception that entered

our legal system as the doctrine of Double Jeopardy.

By the time of Kepner v United States, 195 US 100; __ S Ct ___; 49 L Ed 114 (1904) in our jurisprudential development the Supreme Court counted among its members Oliver Wendell Holmes, Jr. Kepner brought to the Court both a unique set of legal problems, and a clearly-marked point of delineation in the realm of double jeopardy law: the Spanish-American war had brought the Philippines under the jurisdiction of American law, and Congress had passed a law establishing local courts, and providing for local self-government. Among the many aspects of the new judicial code was a provision that "no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment....." 32 Stat at L 691, ch

1369, sec 5; Kepner v United States, supra at 117. Spanish law had contained an analogous provision, providing that one convicted or acquitted of a crime could not be charged again for the same crime, but defining "jeopardy" as the attachment of a final judgment. Under Spanish law, either side to a criminal case could appeal any aspect of the case, and the appellate courts could grant a new trial upon the appeal of either party; accordingly, a judgment was deemed "final" only when the "audiencia," or local supreme court, had passed upon the case, and the matter had passed final review in the supreme court at Madrid. Under this system, the action was considered to be one continuous proceeding from trial through appeal, and an accused was protected against a second conviction only after the first proceeding was concluded. Kepner saw his initial acquittal in the trial court reversed in

the "audiencia" on appeal by the government, and was convicted and sentenced upon retrial. On appeal, he claimed that his second trial violated the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Writing for the five-member majority, Justice Day recounted the old English pleas of autrefois acquit and autrefois convict, and concluded that the finality of a verdict of acquittal was an integral part of the double jeopardy clause -- thus preventing the government from appealing an acquittal even if there were express statutory authority allowing it. Because courts should presume that Congress intended to employ legal terms in a manner consistent with their known construction by the courts, the Court concluded that the enactment making the language of the Double Jeopardy clause part of Philippine law

altered the local usage of the term to make it consistent with the American practice. Thus, the Court concluded, it was error to allow the government to appeal the original acquittal, and the defendant was entitled to an immediate discharge.

In his prescient dissent, Justice Holmes warned that the Court's holding threatened to "fasten[] upon the country a doctrine covering the whole criminal law, which...will have serious and evil consequences." Kepner v United States, supra at 134. In his view, the Court's notion of double jeopardy rested upon fiction and illogic, and while the protection against being placed "twice in jeopardy" should prevent a separate cause of action against one already tried, it should be no bar to a just resolution of the first case. In this view, as in Blackstone's, "jeopardy" required a final

judgment -- and a judgment set aside, whatever the reason and whomever the moving party, was simply not a judgment:

> "[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree

or, notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial....

> "If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm...." Kepner v United States, supra at 134-135.

The contrary view, in Holmes' opinion, would either deny a defendant the right to overturn an erroneous verdict, or require the Law to impose an implicit waiver of the Fifth Amendment in every criminal case in which the accused claims an error at trial -- for the only other logical alternative was unacceptable:

> "It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists....I believe [such] decisions to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is,

> What shall be done with the prisoner? Since at that moment he no longer is in jeopardy from the first verdict, if a second trial in the same case is a second jeopardy....he has the right to go free...." Kepner v United States, supra at 135-136.

Accordingly, Holmes thought the rational solution to the problem was a return to the notion of "jeopardy" as "judgment," and the protection against "double jeopardy" as a guarantee against multiple prosecutions:

> [T]he necessary alternative is that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy, in case of a misdirection, for it must be

admitted that he is in jeopardy, even when the error is patent on the face of the record; as when he is tried on a defective indictment, if judgment is not arrested. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I submit, is that there can be but one jeopardy in one case.

"If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. The

> latter is everyday practice, yet there is no doubt that the prisoner is in jeopardy at the trial....and that a conviction or acquittal not appealed from would be a bar to a second prosecution....For the[se] reasons..., a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below."

Kepner v United States, supra at 136-137.

This view of double jeopardy has much to commend it: it fixes the point of attachment at the point of enforcement, providing each party with the motive and opportunity to set aside an erroneous judgment, but requiring each to submit to

the court's decree in the absence of a reversal. It eliminates the prospect of a single judge unanswerably denying justice either to the accused, or to the victim of crime. And it would place Justice to all emphatically at the heart of judicial concern. Note also that in Palko v Connecticut, 323 US 319 (1937) Justice Cardozo discussed Kepner, observing that "the dissenting opinions show how much was to be said in favor of a different ruling," and remarking, with regard to a state statute allowing prosecution appeals of true acquittals, "Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states?"--and answering in the negative, for "The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks not more than this, that the case against him shall go on until there shall

be a trial free from the corrosion of substantial legal error....This is not cruelty at all, nor even vexation in any immoderate degree....The edifice of justice stands, in its symmetry, to many greater than before," emphasis supplied. But as the contrary view commanded five votes, it was Justice Day's notion of "double jeopardy" that carried the day, and has passed to us as the American doctrine of "double jeopardy" under the Fifth Amendment. However, there is no reason why the logical and historical force of Justice Holmes' view cannot be welcomed in a situation where the Government is seeking only the opportunity for a verdict, from which it has been wrongfully deprived by an erroneous ruling terminating the trial, sought by the defendant. The State here seeks to appeal not an acquittal by a jury, even one arguably caused by erroneous evidentiary rulings of the court, but

rather a legal determination by a judge that no rational juror could find guilt proven beyond a reasonable doubt. If that ruling is incorrect, and sought by the accused, then the State should be allowed to set it aside and present the case to a jury. The historical principles which led to the jeopardy clause demonstrate as much.

WHAT IS AN ACQUITTAL? FROM FONG FOO THROUGH SANABRIA AND MARTIN-LINEN TO THE INSTANT CASE

In Fong Foo v United States, 369 US 141, 7 L Ed 2d 629, 82 S Ct 671 (1962) a corporation and two of its employees were brought to trial for a conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more days of trial, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all defendants, and a formal judgment of acquittal was entered.

The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The Government appealed, and the Circuit Court of Appeals granted the appeal, holding that the district court had no power to grant the directed acquittal under the circumstances of the case. Though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation" the United States Supreme Court held nonetheless that the verdict of acquittal was "final and could not be reviewed." The Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in

history. Petitioner submits that an "erroneous" directed verdict, at least where sought by the defense, is not the same as a verdict from the jury (and petitioner will explore this point subsequently).

Fong Foo was followed in United States v Martin Linen Supply Co, 430 US 564, 571, 97 S Ct 1349, 51 L Ed 2d 642 (1977). There the Court made it clear that a reviewing court would not be bound by the trial court's description of its actions. The Court held that once jeopardy attached, a court's factual resolution of any of the elements of the charged offense would call the protections of the Double Jeopardy Clause into play -- regardless of any trial court error in rendering judgment, and whether or not the case required further fact-finding before entry.

Similarly, in Sanabria v United States, 437 US 54, 57 L Ed 2d 43, 98 S Ct 2170 (1978), after all sides had rested, the trial judge excluded evidence of illegal numbers betting on grounds that the Government had cited the wrong underlying state statute in its federal indictment, and in the absence of any other evidence of guilt, entered a "judgment of acquittal" on defendant's motion. The following day, the Government moved for reconsideration, on grounds that a technical defect in the indictment was correctable under the Federal Rules of Criminal Procedure. On appeal, the First Circuit held that since the proceedings had terminated on grounds unrelated to the defendant's criminal liability, and on the defendant's motion, double jeopardy would not bar a retrial under the holding in United States v Dinitz, 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976); and as the trial court had

erred in dismissing the case for a technical defect in the pleadings, the court reversed the order and remanded for retrial.

On certiorari, the Supreme Court reversed. Noting a difference between a true acquittal on the merits, and a dismissal which is "functionally equivalent to a mistrial," Sanabria v United States, supra at 437 US 63 n 15, the Court nevertheless declined to review the reasons for an "acquittal," holding that even when it stems from a judge's erroneous exclusion of evidence, a "judgment of acquittal, however erroneous, bars further prosecution on any aspect" (emphasis added) of the case, Sanabria, at 69. Rather, the Court felt that the a contrary rule, permitting retrial upon review of all midtrial evidentiary rulings, "would undercut the adversary assumption on which our system of

criminal justice rests," Sanabria, at 78, and materially compromise the protections of the Double Jeopardy Clause. Thus, while a defendant seeking a midtrial termination of the proceedings would take "the risk that an appellate court will reverse the trial court," United States v Scott, supra at 437 US 100 n 13, a termination resulting in outright acquittal by order of the court rather than verdict of the jury was simply not subject to a review which could lead to a second trial (though if sought by the defense, and entered erroneously, why the defendant should not be viewed as having "taken the risk" that the case might be retried so that the Government would have a fair opportunity for a verdict was not explained). See also Smalis v Pennsylvania, supra.

Recognizing that this is a petition for certiorari, and not a brief on the

merits, Petitioner would note briefly that it appears that as a matter of history the development of the jeopardy principle as outlined previously did not include a power of the court to take the case from the jury and enter a verdict of acquittal. Indeed, as that authority developed, initially it was not an authority to take the case from the jury, but rather to instruct the jury that it had a duty to acquit, the verdict still being delivered by the jury. The jury might disregard such an instruction, and if it did so, then it was subject to reversal --but of course on the appeal the Government could oppose on the ground that the instruction was unwarranted given the evidence. As the authority to enter a directed verdict/judgment of acquittal became one of the court to actually take the case from the jury before deliberation and verdict, it was characterized as a ruling of law that there was no evidence

(before this Court's ruling that the standard was whether a reasonable juror could find guilt beyond a reasonable doubt in Jackson v Virginia). See "Directions for Directed Verdicts: A Compass for Federal Courts," 55 Minn L Rev 903 (1971); Henderson, "The Background of the Seventh Amendment," 80 Harv L Rev 289 (1966); Westen and Drubel, "Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81; "Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910.

Candidly, petitioner cannot point to a conflict among state supreme courts or federal circuits on the issue involved here; there can be none, for all those courts must follow Martin-Linen. But this Court, petitioner suggests, has never carefully considered this question, a question of enormous practical

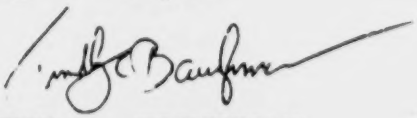
significance, and which asks only for the opportunity for a verdict from the jury. Because, then, the history surrounding the formation and adoption of the jeopardy clause does not support a rule that an "acquittal" by the court, taking the case from the jury on the defendant's motion, is the "same" as a verdict of not guilty by a jury, there being no such principle at the time of the adoption of the jeopardy clause, this Court should reconsider its prior precedents and hold that jeopardy does not preclude trial after an appellate court ruling that the granting of a directed verdict of acquittal, sought by the defendant, was in error.

Conclusion

WHEREFORE, the Petitioner requests that plenary review be granted.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

Appendix A

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

PEOPLE V JERRY LEE MASON, JR.

John H. Gillis
Presiding Judge

Docket #143593
L.C. #91-002401

Roman S. Gribbs

Maureen Pulte
Reilly

_____ Judges

The Court, pursuant to MCR 7.216(A)(10), orders that the claim of appeal, filed August 14, 1991, is DISMISSED for lack of jurisdiction. MCL 770.12; MSA 28.1109 does not permit an appeal by a prosecutor if further proceedings are barred by double jeopardy. The United States Supreme Court in the case of United States v Martin Linen Supply, 430 US 546; 51 L Ed 2d 642; 97 S Ct 1349 (1977) has ruled that double jeopardy precludes further proceedings in a criminal case where the

trial court has entered an order directing a verdict in favor of the defendant.

/s/
John H. Gillis

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on

Sep 17 1991

/s/
Chief Clerk

APPENDIX B

MICHIGAN SUPREME COURT

ORDER
Entered: November 25, 1991

92454

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

SC: 92454
COA: 143593
LC: 91-002401

JERRY LEE MASON JR.
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

November 25, 1991 /s/ Corbin R. Davis
Clerk